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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 329

VIRGIL WISEMAN,

Petitioner,

against

SINCLAIR REFINING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Opinion and Proceedings Below

The Court of Appeals for the Second Circuit in unanimously reversing the judgment in favor of petitioner rendered in the District Court after a trial to a Judge without a jury in the Civil side of the Court in this Seaman's action for alleged personal injuries and maintenance, rendered its written decision and opinion remanding and ordering dismissal of the complaint, which is reported at 290 F. (2d) 818. The opinion is printed in the Appendix to the Petition herein at pages 15-17. The appeal was argued May 5th, 1961 and decision was rendered May 25th, 1961.

The Trial Court had rendered no opinion oral or written, in awarding judgment to petitioner, nor had the District Court made any findings of fact or conclusions of law

up to the time of entry of judgment on December 8th, 1960 or for a long time thereafter (2a). Not until five days after respondent perfected its appeal to the United States Court of Appeals by filing its brief and Appendix on appeal in the Court of Appeals with proof of service on petitioner's attorney, is the Trial Court reported to have made findings of fact and conclusions of law and these obviously were made *ex parte* without notice on March 29th, 1961. These findings and conclusions were not part of the record certified to the Court of Appeals, but petitioner has set them out in full at pages 2, 3 and 4 of its Petition herein. There is serious question whether a Trial Court has power three and one-half months after judgment has been entered and after an appeal has been perfected for the first time to make findings and conclusions. Rule 52(b) of the Rules of Civil Procedure provides:

> "*Upon motion of a party made not later than ten days after entry of judgment,* the Court may amend its findings or make additional findings and may amend the judgment accordingly." (Italics added)

The so-called findings of fact and conclusions of law printed at pages 2, 3 and 4 of the Petition therefore are *dehors* the record and it is submitted, should not be entitled to consideration herein.

The Trial Court without leaving the bench, and without rendering any opinion oral or written, awarded $21,000.00 in a lump sum to the petitioner (57a). The Trial Court directed petitioner's attorney to submit proposed findings of fact and conclusions of law and denied the request of respondent's attorney to submit a brief, especially with respect to hospital records which were offered in evidence by the petitioner (53a). Proposed findings of fact and conclusions, prepared by petitioner's attorney, were submitted on December 8th, 1960, eight days after the trial concluded, but the Court refused to sign them (2a).

The Court of Appeals directed dismissal of the complaint for damages for personal injury on the ground there was no evidence of liability (Petition, p. 17) and it directed the dismissal of the complaint for maintenance and cure, because of the petitioner's indifference to his physical condition and his persistent failure properly to seek cure to respondent's detriment (Petition, p. 17).

Questions Presented

The petitioner attempts to propound five questions. Rule 23 (1e and 4), requiring a concise statement of the facts and presentation with accuracy, brevity and clearness, has not been complied with in the Petition. Upon a proper statement of the facts in this case, no question worthy of consideration by this Court will exist and in fact the propriety of the decision of the Court of Appeals will be emphasized.

Statement

In the appeal to the Court of Appeals, the whole record in the District Court was printed as appellant's Appendix. The numerals in parentheses herein unless otherwise indicated, refer to pages of appellant's Appendix in the Court of Appeals, which we assume has been filed in this Court in conformity with Rule 21(3).*

Shortly before the Court of Appeals rendered its decision, the Supreme Court had held that even a jury verdict for a railroad employee under the Federal Employers' Liability Act must be vacated if there is no evidence to support it and ordered judgment for the employer, *New York, New Haven & Hartford R. Co.* v. *Henagan*, November 21st, 1960, 364 U. S. 441.

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* Petition was served July 28, 1961. Notice of filing has been delayed.

Facts

Petitioner's suit rests on his claim that he slipped on a stairway or ladder of respondent's ship and struck his right ankle. Discussion of the claimed injury must be postponed until later in this brief. As to what occurred, no witnesses, other than the plaintiff, testified. In connection with his effort to create the impression that the stairway may have been greasy, he testified as follows on cross examination:

> "Q. You did not see any grease on the step on the *Shelden Clark,* did you? A. Not as I was going down, I didn't * * *.
>
> Q. My question is, you did not see any grease on this step, did you? A. At that time, no.
>
> Q. You did not look at the step afterwards, did you? A. I looked in my shoe. There was grease on my shoe.
>
> Q. But you didn't look at the step? A. No, I did not." (25a)

Thus, on petitioner's own testimony, both before and after petitioner allegedly slipped, he saw no grease on the steps or ladder. No one else did either.

At this non-jury trial, respondent rested at the end of petitioner's case without calling any witnesses.

Petitioner obtained employment on respondent's tank vessel on August 10, 1957 after being sent to the ship by his Union. Respondent was required to hire petitioner (19a). Petitioner signed on as an engine room employee, to wit, a fireman water tender (7a).

Petitioner testified he could not remember when he was injured, but guessed he was injured August 13th or August 16th, 1957 (19a) when the ship was off Cape Hatteras en-

route from Marcus Hook, Pa., to Houston, Texas (19a). Upon later arrival at Houston he did not sign off but sailed back to Marcus Hook. He signed off on August 22nd, 1957 and at the same time requested and obtained a master's certificate for treatment in a U. S. Public Health Service Hospital (12a). When he signed off he also signed a printed form (Ex. A, 11a) on the top of which was printed "Personal Illness Report." In longhand writing on this report, which writing according to the printing on the form is supposed to be and appears to be that of the man reporting sick, the following appears:

> "My leg keeps swelling and then the swelling going down. I have an old scar tissue that was broken open and does not want to heal. I request hospital check up. Injury on right leg."

This statement makes no mention of any accident. It says nothing about an aching back. No accident was claimed and petitioner did not sign a "Report of Personal Injury" on the form prescribed for injuries.

Hospital records dealing with the petitioner, to which we will refer later and which were offered in evidence by the petitioner (18a) contain entries that petitioner had had a varicose ulcer on his leg for from two to four years (Ex. 3, Ex. 4, Ex. 5). These records also reveal that petitioner had long been a chronic alcoholic and in 1954 had had delirium tremens. Earlier he had contracted syphilis and gonnorhea and in 1951 he suffered epileptic seizures.

Petitioner served on respondent's vessel for only twelve days in August 1957. Prior to that, his last employment had been on a river boat running from New Orleans to Memphis, Tennessee in April 1957 (19a). Before that his last prior employment had been in December 1956 on the "Chickersaw". He had served only one watch. The ship left him on the dock (20a).

When petitioner signed off respondent's ship on August 22nd, 1957 he admittedly made no effort to obtain medical or hospital care for seven days. He testified (22a):

> "Q. Where were you between the 22nd and the 29th? A. In Philadelphia.
>
> Q. What were you doing there? A. Somebody told me that shipping was good there, so I went there to see if I could catch another ship.
>
> Q. What time of the day or night was it when you went to the Marine Hospital in Stapleton, Staten Island, on August 29th? A. I believe it was about 4 o'clock in the morning.
>
> Q. Were you sober or drunk? A. I had been drinking."

The hospital record of his visit August 29th, 1957, Exhibit 3, states:

> "8/29/57 Patient has had vericose ulcer for 4 years, has no proof of eligibility, is acutely intoxicated at 4:00 A. M. Says leg is very painful for past 11 days and worse now. Leg is swollen, hot and tender. Hard to evaluate because is very drunk. Physical examination 2" varicose ulcer over right medial malleolus and surrounding area of erythema and induration. Ulcer has necrotic base. Venus cord can be palpated along superficial vein in calf and is tender to touch. Horman's negative, no calf swelling. Impression, ulcer right leg and acute cellulitis and superficial thrombophlebitis minimal. Alcoholic intoxication."

Petitioner testified the ship had given him a certificate for admission to the U. S. Public Health Hospital on August 22nd, 1957 (12a).

Thereafter from August 29th to October 9th, 1957 the record gives no suggestion that petitioner sought or ob-

tained medical care. A chronic alcoholic, he admitted that during this period he "lived" in the Bowery (23a), a well known haven for derelicts in New York. Thus on petitioner's own admission, he failed to obtain medical treatment from August 22nd to October 9th, a period much longer than the 7 days that the petitioner dwells on at pages 5 and 8 of his petition.

On October 9th, 1957 petitioner gained admission to Grasslands Hospital in Valhalla, New York. The record there shows (Ex. 4):

> "Admitted for Treatment of varicose ulcers. Patient has had varicose veins for two years. Developed an ulcer on medial malleolus of right foot 1 year ago which healed under management of private physician. One month ago ulcer re-occurred.
>
> * * * * *
>
> Patient is an alcoholic * * *. Had delirium tremens in 1954."

Page 3 says:

> "10/9—Resident's Admission Note. This pt. admitted from Surg. Clinic. Has had varicose veins for 2-3 years. Approx. 1 yr. ago noted an ulcer on Rt. ankle and soon after noted a painful cord up his Rt. leg. This has persisted and continues to cause him discomfort. His ulcer has not responded well to Rx. Also, 1 year ago he noted a mass in his L. buttock which has persisted. Exam.—1 Painful narrow cord running from R. medial malleolus to Rt. thigh along route of Saphenous vein. Chronic ulcer at Rt. medial malleolus. 2. Painless, non-tender mass of L. buttock overlying ischial tuberosity slightly adherent to surrounding tissues. Imp: L. Lipoma L. Buttock, 2. Thrombosis R. saphenous vein, 3. ulcer, Rt. medial malleolus.
>
> Antonourus, M. D."

On October 18th, 1957, Wiseman underwent a right saphenous vein high ligation and stripping in Grasslands Hospital. He also had a cyst on his buttocks removed. On October 29th, 1957 he was discharged from Grasslands Hospital.

In the period from October 29th, 1957 to January 6th, 1958 we lose the petitioner except for 3 days. On November 26th, 1957 he was examined by Dr. David H. Smith who was the only medical witness at the trial. He was not treated by Dr. Smith who saw him for the second time at the trial (30a). On December 11th, 1957 petitioner next appears at the U. S. Public Health Service Hospital and, "smelling of alcohol" was refused treatment (Ex. 3, p. 2). He next appears on January 4th, 1958 at the U. S. Public Health Service Hospital, is incoherent and smells of alcohol and is refused treatment (Ex. 3, p. 3). He received no treatment from October 29th, 1957 to January 6th, 1958.

From January 6th, 1958 to February 28th, 1959 petitioner sought and was given treatment at various times at the U. S. Public Health Hospital, Staten Island, N. Y. The hospital reports record his alcoholic sprees on January 4th, 1958, April 18th-20th, 1958, August 20th, 1958, October 15th, 1958, November 28th, 1958 (Ex. 5, pp. 117, 123, 10, 12, 45, 50, 67).

In a drinking bout in April 1958 he bashed his face and eye (Ex. 5, p. 50), and injured his ribs (Ex. 5, p. 67). On August 20th, 1958 he "was knocked on the head tonight by a wine bottle and robbed of the rest of his money $16.00. He is afraid he will go into the DT's—no real complaint except for alcoholism * * * lost his elastic stocking" (Ex. 5, p. 122).

On October 15th, 1958, petitioner was found to be suffering from alcoholism and a fractured rib (Ex. 5, p. 10). His hospital record (Ex. 5, p. 4) stated:

> "A chronic and acute alcoholic—Patient has been in the OPD (Outpatient Department) for 5 months

> and has many broken appointments, has 'lost' or sold his elastic stocking and had applied to hospital on at least one occasion for readmission altho he had not shown one bit of concern or desirability to go back to work."

The U. S. Public Health Service Hospital furnished elastic stockings to petitioner on February 18th, 1958, May 8th, 1958, August 20th, 1958, October 10th, 1958 and February 27th, 1959 (Ex. 5, pp. 115, 69, 122, 4, 127).

On this record petitioner's counsel requested an award from the Trial Court of loss of wages from August 22nd, 1957 until January 30th, 1961 (49a) and maintenance for the same period (except for those days when petitioner was in a hospital) plus pain and suffering.

The Trial Court said:

> "The judgment will be for $21,000.00 including all three matters." (57a)

None of the hospital records give the faintest suggestion that petitioner at any time made complaint of an accident or traumatic injury either to his legs or back on shipboard. The conditions for which petitioner was treated were of long standing and they antedated his employment on respondent's ship, as the hospital records show.

Petitioner for a long time had been a professional prize fighter and admittedly had skipped rope and shadow-boxed and other arduous training had imposed great strain on his legs and back for twelve or fourteen years (24a). He had 97 professional fights (25a).

Dr. David H. Smith, who testified in petitioner's behalf at the trial, never treated petitioner and saw him only once in his life before the trial (30a). Petitioner was referred to this doctor by his attorney (33a). This doctor admitted he had testified on about 15 other occasions within the year in the Southern District of New York alone

(33a). He further admitted he made no examination of the hospital records before testifying (36a). He took no X-rays (39a) and he made no interrogation of petitioner as to his background and history with respect to his legs (34a) or back (38a) before testifying. Petitioner himself admitted that he had made no complaint about his back until he had visited this doctor on November 26th, 1957 (40a). His hospital records are silent as to any back complaint. He had had a bad back for years (17a). The cyst on his buttocks he had had for 3 or 4 months prior to joining respondent's ship (26a).

ARGUMENT

POINT I

The Court of Appeals applied proper rules.

That the Court of Appeals is permitted, in fact it is required, to pass on sufficiency of evidence, clearly is indicated by Federal Rules of Civil Procedure, Rule 52(b) which provides:

> "• • • When findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

This Court said in *McAllister* v. *United States*, 348 U. S. 19, at page 20:

> "A finding is clearly erroneous when although there is evidence to support it the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This record cannot be read without reaching the "definite and firm conviction that a mistake has been committed," when the District Court awarded damages to the petitioner.

As the Court of Appeals pointed out (Petition, p. 17) petitioner himself admitted he did not see grease on the steps either before or after the instant occurrence. Proof of the presence of grease on the steps therefore was lacking. Petitioner's own illness report, signed by him, makes no reference to an accident or grease on the steps and at no time in any hospital did he make claim of an accident. Certainly by remaining in Philadelphia for seven days after signing off respondent's ship

> "to see if I could catch another ship" (22a)

petitioner does not indicate that he fell sick or was injured while in respondent's employ. Obviously he did not then consider himself unfit for duty. Nor did he obtain a Medical Certificate that he was unfit for duty.

Proof that petitioner suffered an injury or fell sick during his employment on respendent's vessel is lacking. Petitioner's own report of illness signed by him and the hospital records show that the condition for which he makes complaint was of long standing and resulted solely from his own wilful misconduct and neglect and his indifference to his own well-being. Hospital records clearly show that petitioner suffered from an ulcer on the internal malleolus of the right foot for from two to four years prior to joining respondent's ship. Even Dr. Smith, who testified for petitioner at the trial, admitted that such an ulcer, as well as the condition of petitioner's legs, could exist without trauma (38a-39a). Dr. Smith further conceded that a wound, abrasion or laceration is not an ulcer (35a). Dr. Smith testified:

> "If the wound doesn't heal up, then you get an ulcer. If it becomes chronically irritated and indurated and

infected and you get changes in the tissues, then it is possible for a wound to become an ulcer." (35a)

Thus, petitioner's leg ulcer before and after he served on respondent's ship, resulted from his failure to obtain and continue medical treatment. He brought the conditions on himself.

Instead of being diligent and seeking medical cure and treatment he aggravated his old ailments and induced new ailments and sores by neglect, indifference and chronic alcoholism.

Thus, petitioner suffered no injury on respondent's ship and any physical condition of which he made complaint resulted solely from his own misconduct.

Petitioner attempts to create the impression at page 6, that because respondent rested at the end of petitioner's case without calling any witnesses, respondent practically has conceded liability. The law is well established that uncontradicted testimony whether of fact witnesses or of experts, does not have to be accepted. *The Conqueror*, 166 U. S. 110 at 130, 133; *Dayton P. & I.* v. *Public Utilities Corp.*, 292 U. S. 290 at 299. But there was no need for respondent to call any witnesses, because the proof so clearly established that no grease was seen on the steps, that petitioner complained only of old physical conditions, which long had existed prior to his employment on respondent's ship and that after leaving it he failed, through his own wilful misconduct, to get medical attention from August 22nd to October 9th or almost 50 days, not 7 days as petitioner says. From October 29th, 1957 to January 6th, 1958, he got no treatment. Petitioner's own doctor witness condemned such neglect and indifference.

On the basis of the evidence in this case the Court of Appeals was compelled to order dismissal of the complaint. The decisions it relied on in denying recovery for mainte-

nance are in keeping with the decisions of this Court on the subject. But in addition it is apparent petitioner cannot recover maintenance for physical conditions which long antedated his service on respondent's ship and which were caused by petitioner's wilful misconduct before he entered respondent's employ and which were aggravated by his wilful misconduct after he left that employ.

CONCLUSION

It is respectfully submitted that the petition for certiorari herein should be denied.

Dated: New York, N. Y.,
August 21st, 1961.

Respectfully submitted,

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